No. 18783

In the

United States Court of Appeals

For the Ninth Circuit

State Farm Mutual Automobile Insurance Company, a corporation,
Appellant,

vs.

Alice Willene Williamson, a minor; John Brenkman, a minor; Carl E. Brenkman; C. W. Waddoups; Clara R. Waddoups; and Sara R. Murry, dba Rudolph Chevrolet,
Appellees.

Brief of Appellant

Lewis Roca Scoville Beauchamp
& Linton
By John P. Frank
D. W. Grainger
900 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

SUBJECT INDEX

TABLE OF AUTHORITIES

STATUTES AND RULES

OTHERS

No. 18783

In the

United States Court of Appeals

For the Ninth Circuit

State Farm Mutual Automobile Insurance Company, a corporation,
Appellant,

vs.

Alice Willene Williamson, a minor; John Brenkman, a minor; Carl E. Brenkman; C. W. Waddoups; Clara R. Waddoups; and Sara R. Murry, dba Rudolph Chevrolet,
Appellees.

Brief of Appellant

JURISDICTION

State Farm Mutual Automobile Insurance Company filed an action under the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201, to determine a question of liability under a policy of insurance (R. 54-55*). Diversity of citizenship and the jurisdiction amount were duly alleged (R. 1) and

*The transcript of record for this appeal comes in two volumes. The documentary record appears in Volume 1 and in this brief is designated by references in parenthesis to R. The second volume includes the transcript of the evidence and proceedings at trial. That volume is here designated by references in parenthesis to T.

admitted (R. 9, 16). The case was heard in March of 1963 in Phoenix, Arizona, before a visiting judge, the Honorable John C. Bowen. Judgment was given for the defendants on March 21, 1963 (R. 56). Plaintiff move for a new trial and, in the alternative, for a motion in accordance with its motion for directed verdict. Both motions were denied on March 25, 1963 (R. 56-57). On April 19, 1963, plaintiffs filed notice of appeal (R. 57); and all other appropriate steps for appeal have been duly followed. This Court has jurisdiction under 28 U.S.C. Sec. 1291.

STATEMENT OF FACTS

A. General Background.

This is a case in which a father and a mother were the named insureds on an insurance policy. They permitted Kenneth Judd, their 20-year-old son, who was then living with them, to use the family car from time to time under restrictions which are more fully developed below. The son was expressly forbidden to permit others to use the vehicle. Nonetheless, on the occasion which gives rise to the instant case, the son did permit a young lady, whom he had been dating and whom he subsequently married, Alice Willene Williamson (hereafter referred to as Willene), to use the car (T. 62). She intended to use it, not for any purpose of concern to the named insureds, but for the purely personal purpose of her own of getting an Arizona driver's license (T. 63). While she was using the car, an accident occurred. At the time of the accident, Willene was the only occupant of the Judd car.

The plaintiff insurance company brought suit for a declaratory judgment, asking for a construction of their contract of insurance with Ray A. Judd and Lucille B. Judd, as named insureds, and for a determination of rights and

liabilities of plaintiff and defendants under the circumstances of the accident (R. 5). Plaintiff demanded a finding that the defendant, Alice Willene Williamson, is not covered by the insurance policy. The demand was based on the grounds that Willene was not using the automobile "with permission of the named insured". Such permission was required by the policy. The Court, determining that no express permission had been granted (T. 141), sent the case to the jury upon the sole issue of the existence or non-existence of implied permission (T. 141, 146).

The plaintiff moved for a directed verdict at the close of the evidence on the grounds that there is no evidence of implied permission, that the "evidence is clear and uncontroverted," and that as a matter of law plaintiff was entitled to judgment (T. 130-131). Plaintiff's motion was denied (T. 131). Plaintiff renewed that motion, asking for judgment notwithstanding the verdict, at the same time that the plaintiff moved for a new trial. Both motions were denied together, on March 28, 1963 (R. 56-57).

B. Facts Bearing on Implied Permission.

The essential argument in this portion of the appeal is that there was simply no evidence at all to go to the jury on the question of implied permission. The facts, therefore, merge with the argument in exceptional degree in this case, and to avoid duplication, we shall reserve the bulk of the actual transcript quotation on the relevant points to the argument section of the brief. However, by way of summary, the essential facts are as follows:

(1) Kenneth had specific permission to use the car for driving to and from a vocational school held at Phoenix Union on the morning of the accident (T. 13-14).

(2) He always had to ask specific permission to use the car, except for a time when he had been attending Arizona State University and then had a "blanket" permission to drive to and from class (T. 19-20, 23).

(3) Mr. and Mrs. Judd had told Kenneth, and had frequently reminded him, that he was not to let anyone else use the car (T. 11, 116).

(4) Both he and Willene knew that Willene was not to drive the car at the time that Kenneth loaned it to her. They had agreed that his parents were not to know that she had driven the car (T. 65, 116).

(5) Willene had never before driven the Judds' automobile (T. 64).

(6) Until after the accident in question, neither Mr. Ray A. Judd nor Mrs. Lucille Judd, knew that Willene, or anyone but Kenneth, had ever driven their car (T. 12, 49).

(7) Willene's parents were tenants on the Judds' property, and Willene had been dating their son; but the Judds did not know Willene well at the time of the accident (T. 12, 50), and she was not then a member of their family.

C. Instruction on Implied Permission.

Each party offered proposed instructions on implied permission. The plaintiff's proposed instruction is its No. 3, and is as follows:

> "You are instructed that permission as used in these instructions may be of two kinds—express or implied.
>
> "Express permission is defined as permission that is affirmative in character and is clear and outspoken and is manifested by direct and appropriate language.
>
> "Implied permission is defined as permission which is inferred or deduced from the circumstances or may result from the course of conduct from the parties in which they mutual acquiesce, or it may arise from a

course of conduct pursued with knowledge of the facts for such time and in such manner as to signify clearly and convincingly an understanding consent which amounts in law to a grant of the privilege involved. *United Services Automobile Association v. Preferred Accident Insurance Company of New York,* 190 F.2d 404" (R. 22).

The Court rejected plaintiff's instruction No. 3 and gave defendants' requested instruction No. 4 with a modification not here relevant.*

In will be apparent that the fundamental difference between the two instructions is that the plaintiff's instruction provided that permission might, among other things, "arise from a course of conduct pursued with knowledge of the facts." Defendants' instruction took the knowledge element out, providing that implied permission could be based on "lack of objection."

Exception to the granting of the defendants' instruction and the denial of plaintiff's instruction as it related to this matter was presented by one statement and a cross-reference. Counsel excepted to the refusal of plaintiff's No. 3 on the ground that, "the proper test of implied permission as to burden of proof is that the implication must signify clearly and convincingly an understanding consent" (T. 152). The objection to the giving of defendant's instruction No. 4 was rested upon the grounds previously stated after the refusal to grant plaintiff's No. 3 (T. 153).

---

*The modification dealt with the fact that the Court altered the instruction regarding express permission, telling the jury that they were not to find that express permission was granted in this case. The Court thus sent only the question of implied permission to the jury. The instruction then goes on to give, in substance and predominantly word for word, the instruction requested by the defendants Waddoups, et al, regarding the question of implied permission. Defendant Brenkman's request No. 3 was, in relevant parts, similar to plaintiff's.

STATUTES INVOLVED

Arizona Revised Statutes Section 28-1170.

> "'Motor Vehicle Liability Policy' defined. . . . B. The owner's policy of liability insurance must comply with the following requirements:
> . . . 2. It shall insure the person named therein and any other person as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles within the United States or the Dominion of Canada, subject to limits exclusive of interests and costs, with respect to each motor vehicle as follows: . . ."

ASSIGNMENTS OF ERROR

1. The judgment should be reversed because the trial court erred in denying plaintiff's motion for directed verdict made at the end of the case (T. 130-131) and plaintiff's motion for judgment notwithstanding the verdict or for new trial. The latter motions were made on March 25, 1963, and denied on March 28, 1963 (R. 56-57). Denial of these motions is error, since there is insufficient evidence to justify a finding of implied permission.

2. The judgment should be reversed because the trial court gave erroneous and misleading instructions to the jury on the question of implied permission, refusing to give the correct instruction submitted as Plaintiff's Requested Instruction No. 3.

The objectionable part of the court's instruction is as follows:

> "If you find that the actions and conduct of Ray A. Judd and Lucille Judd are such as to signify their assent or lack of objection to the delegation of the use of the automobile in question to Alice Willene William-

son, now Alice Willene Judd, then you should find such use was with the implied permission of Ray A. Judd and Lucille Judd." (T. 141-142)

The giving of that instruction was duly objected to at T. 153, incorporating by reference plaintiff's earlier objection based on the ground that "the proper test of implied permission as to burden of proof is that the implication must signify clearly and convincingly an understanding consent." (T. 152).

Plaintiff's Requested Instruction No. 3 makes clear that knowledge, or circumstances signifying assent, are essential before lack of objection can amount to implied permission. The requested instruction is as follows:

"You are instructed that permission as used in these instructions may be of two kinds—express or implied.

"Express permission is defined as permission that is affirmative in character and is clear and outspoken and is manifested by direct and appropriate language.

"Implied permission is defined as permission which is inferred or deduced from the circumstances or may result from a course of conduct of the parties in which they mutually acquiesce, or it may arise from a course of conduct pursued with knowledge of the facts for such time and in such manner as to signify clearly and convincingly an understanding consent which would amount to a grant of the privilege involved.

"United Services Automobile Ass'n v. Preferred Accident Ins. Co. of N. Y., 190 F.2d 404." R. 22.

Plaintiff duly objected to the court's refusal to give that instruction. The objection was made in the language set forth above. (T. 152)

SUMMARY OF ARGUMENT

The appeal rests upon two contentions:

1. In this case, the named insured permitted his son to use his car. The son, although under express instruction to do nothing of the sort, permitted a third person to use the car and an accident resulted. The issue is whether the insurance company is liable under the omnibus clause. The trial court concluded that there was no express permission, as there certainly was not. However, it allowed the issue of implied permission to go to the jury. We contend that this was error.

Appellant realizes that it is an uphill task to persuade a reviewing court that there is no evidence at all to go to a jury in any given case. But in this case, we think we make our way up the hill. Not only is there no evidence on the basis of which implied permission can be concluded, but there was an express prohibition against just such a thing as this, and the named insured sought, by carefully guarded conduct, to prevent promiscuous use of the car.

The applicable cases are discussed in the brief. They all come to the same thing: a finding of implied permission must be based on evidence, and is negated by a prohibition. Here there was no such evidence, and there was a prohibition.

2. As the Statement and Argument show, there was a serious dispute on the key instruction. The court below gave an instruction from which the jury could conclude that if the named insured did not object, implied permission could be concluded. There was in that instruction nothing to show that the named insured must have some knowledge of the use—a simple failure to object, whether he knew about it or not, was enough. Appellant on the other hand insisted that there must be some element of knowledge or at least some other circumstance signifying assent before implied permission could be assumed.

The Argument presents numerous cases supporting this latter point of view. We have been cited to none supporting the proposition that implied permission may be concluded from simple lack of objection without more.

ARGUMENT

I. There Was Insufficient Evidence to Sustain a Finding of Implied Permission.

In various ways, appellant challenged the sufficiency of the evidence to show implied permission. One or the other of its motions in this regard should have been granted.*

The ultimate question in this case is: An insurance policy is issued to parents, and the parents give their child limited rights to use the insured vehicle. Is the insurance company liable when the child, in the teeth of his parents' directions, permits the car to be used by someone else and an accident results from that use? The legal point of interpretation depends upon the "omnibus" clause of the insurance policy issued by State Farm Mutual to Mr. and Mrs. Ray A. Judd; there is no other claim of liability. The clause in question is as follows:

> "D. Definitions—Insuring Agreements I and II ... Insured—under coverages A, B, C and M, the unqualified word 'insured' includes ... (3) any other person while using the automobile, provided the actual use of the automobile is with the permission of the named insured. ..." (Plaintiff's Exhibit 1 admitted at T-10).

Under Arizona law, an identical question may arise as a matter of interpretation of the relevant Arizona statute,

---

*The plaintiff moved for a directed verdict and that motion was denied (T. 130-131). Then plaintiff moved, in addition to its motion for a new trial, "for a judgment in accordance with plaintiff's motion for directed verdict." (R. 41). Both of those motions were also denied (R. 56-57). See also Statement of Facts, *supra.*

A.R.S. Sec. 28-1170, which provides that an insurance policy covers the person named and any other person who is using the motor vehicle with the express or implied permission of the named insured. *Jenkins v. Mayflower Insurance Exchange,* 93 Ariz. ....., 380 P.2d 145 (1963). The Arizona statute appears to be taken from the California statute, which is essentially identical in this regard, Cal. Vehicle Code, Sec. 16451, a matter to which we shall return below.

Suffice it to say for the moment that whether it is a matter of interpretation of the policy, or of the statute, the issue is whether there was implied permission from the named insureds for the use of the vehicle by Willene. This is the only question which was sent to the jury; it was settled in the judge's instructions that there was no express permission (T. 141).

A. THE MEANING OF "IMPLIED PERMISSION".

"Implied permission" has been defined in *Hinton v. Indemnity Insurance Company of N.A.,* 175 Va. 205, 8 S.E. 2d 279, 283 (1940). There, in an analogous situation and under a similar statute, the Court defined "implied permission" as follows:

> "On the other hand, the correlative word, 'implied' as defined in Webster's New International Dictionary, Second Ed., means 'inferential or tacitly conceded'. It [implied permission] involves an inference between the parties, in which there is mutual acquiescence or lack of objection *under circumstances signifying assent.*" [Emphasis supplied].

In showing "implied permission", the burden is on him who wishes to prove it. There must be some affirmative evidence of the "implied permission," *Hamm v. Camerota,* 48

Wash. 2d 34, 290 P.2d 713 (1955). The concept has been held to require actual knowledge on the part of the named insured. A general delegation of the right to use the vehicle was held not to cover use by others when the named insured had no knowledge of such use in *Duff v. Alliance Mutual Casualty Company,* 296 F.2d 506, (10th Cir. 1961); and in the latter case there was not (as there is here) an express prohibition upon the use of the car by anyone else.

There can never be implied permission when the use in question is in the teeth of express instructions by the named insured, where any possible implication of such permission is nullified by the express prohibition. For a collection of cases see 160 A.L.R. at 1206: "The original permittee who has given permission to use the automobile but has been expressly forbidden to delegate this authority can not do so, and the use of the car by the second permittee in violation of the named insured's express order is not within the protection of the policy." See also *Columbia Casualty Company v. Lyle,* 81 F.2d 281, (5th Cir. 1936); *Cocos v. American Automobile Insurance Company,* 302 Ill. App. 442, 24 N. E. 2d 75 (1939); *Clemons v. Metropolitan Casualty Insurance Company,* 18 S.2d 228 (La. App. 1944); *Ohio Casualty Insurance Company v. Plummer,* 13 F. Supp. 169 (D.C.S.C. Tex. 1935).

Further, *Dodson v. Sisco,* 134 F. Supp. 313 (U.S.D.C. W.D. Ark. 1955), a case exceedingly similar to the one at bar, and arising under a very similar statute, involves an express prohibition upon loan of a car. The prohibition was held sufficient to negate the existence of implied permission.

There can not be "implied permission" without the "*knowledge* of the named insureds, regardless of what permission was given by other persons," *Card v. Commercial Casualty Company,* 20 Tenn. App. 132, 95 S.W. 2d 1281, 1285 (1936).

[Emphasis supplied]. The term "permission" contemplates something other than mere sufferance or toleration:

> "It may arise and be implied from a course of conduct pursued *with knowledge of the facts,* for such time and in such manner as to signify and be compatible only with an understanding consent amounting to a grant of the privileges involved." *Tomasetti v. Maryland Casualty Co.,* 117 Conn. 505, 169 Atl. 54, 55 (1933). [Emphasis supplied]

The best and most completely relevant discussion of this problem in an almost identical fact situation is *Norris v. Pacific Indemnity Company,* 39 Cal. App. 2d 420, 247 P.2d 1 (1952). In *Norris,* a father had permitted his minor son to use his automobile but with an express prohibition on letting anyone else use it. The son nonetheless permitted a friend to use the car for personal errands and an accident resulted in the course of that use. The issue, as here, was whether the insurance company was liable under the omnibus clause of the policy or under the statute, the clause in the statute being essentially the same as in the instant case.

The California Supreme Court, noting that "the use by a third person is not protected by an omnibus clause in an insurance policy where the owner has expressly forbidden it," holds that "there is no decision in this state which construes or applies similar language in insurance policies in accordance with" the claimant's contention. The Court noted, with solid citations, that if there were a "course of conduct indicating assent by the assured to use by others," then an implication could be drawn; but that where there were no facts showing express or implied permission, the driver is not covered. One Justice dissented, a matter to which we shall refer below.

B. THE PORTER DECISION DOES NOT ALTER THE FOREGOING PRINCIPLES.

This Court has touched upon the present subject in *State Farm Mutual Automobile Insurance Company v. Porter,* 186 F.2d 834, 839, (9th Cir. 1950), a decision which at the page cited does contain a dictum which requires recognition. On its facts, the named insured was a resident of Nebraska. His wife had left him, taken his car, and had proceeded to California, this departure being without the husband's consent. While in California, the wife permitted a third person to use the car, and an accident resulted in the course of that use. The issue was whether the insurance company was liable.

The whole weight of the *Porter* case goes to the fact that implied permission had been repeatedly admitted by the defense. This is the entire thrust of the whole discussion of the case, and the complete basis for decision. However, in the course of reaching its result, this Court referred to a statement by the adjuster that he was satisfied that the wife had the permission of the named insured to bring the automobile to California and that the actual driver in turn had her permission to use the car. This Court then said, "If such were the facts they would make out a case for permissive use by [driver], for it appears to be the rule that if the owner's permittee has entrusted the automobile temporarily to another, the latter's use is deemed to be within the owner's permission. *Haggard v. Frick,* 6 Cal. App. 2d 392, 44 P.2d 447, 448."

If the *Porter* dictum means simply that whenever a named insured permits a second person, and the second permits a third person to drive his car, the insurance company is liable regardless of all other circumstances, then the dictum is too broad. We need not pause to consider whether *Haggard v. Frick,* a decision of the Appellate Division in Cali-

fornia, goes to any such length, because it is previous to the *Norris* case, set forth fully above, which was a decision of the Supreme Court of California. *Haggard* is in fact totally irrelevant to the instant subject, since it dealt with a wholly different section of the California statute.

Haggard v. Frick came up under a statute which was then Cal. Civ. Code, Sec. 1714¼, later carried over into Cal. Vehicle Code, (1935) Sec. 402(a), and now carried forward as Cal. Vehicle Code, Sec. 17150. That California statute involves the liability of an *owner;* while the liability of an *insurer* is covered by Cal. Vehicle Code, Sec. 16451, which is carried over from Cal. Vehicle Code (1935), Sec. 415. While the language of owners' liability and insurance companies' liability is substantialy the same, it is clear that California reaches separable results in those two situations, as the *Norris* case shows. Note also that *Haggard v. Frick* is cited only in the dissenting opinion in *Norris.*

We do not mean to suggest that *Haggard v. Frick, supra,* is in anywise minimized or diminished in its weight by *Norris.* It simply deals with a different problem. This is best illustrated by the subsequent use in the California Court of both cases. See, for example, *Traders & General Ins. Co. v. Pacific Employers Ins. Co.,* 276 P.2d 628, 631 (1954), identical in this respect on rehearing, 120 C.A. 2d 158, 278 P.2d 493, 497 (1955), in which *Norris* is interpreted as a case in which, where "the owner's son, contrary to express instructions, lent the car to the driver . . . the court determined [this] to be operation without consent." Liability in *Traders* was traced through Sec. 402 *supra,* which concerns owners' liability, not through Sec. 415 *supra,* which deals with insurer's liability. In *Peterson v. Grieger, Inc.,* 17 Cal. Rptr. 828, 367 P.2d 420, 426-427 (1961), a case involving owners' liability in the absence of express pro-

hibition, *Haggard v. Frick* is cited as authority while *Norris* is given a *cf.*

We conclude that every jurisdiction which has dealt with the permittee and sub-permittee problem and which has considered *Porter* and *Norris* has found no liability under an omnibus clause where the use by the sub-permittee was under prohibition by the named insured.

We conclude that this Court, in the quoted dictum in *Porter,* did not mean to reject all of the other elements which are requisite to make up implied permission, both under the omnibus clause and under the California statute. It focused in that sentence on the two matters which were all that were necessary there, because of the exceedingly broad nature of the admissions in that case; for the admissions did totally yield the issue. But certainly this Court did not mean in that passage to reject the dozens upon dozens of decisions which exist in this field without even mentioning them. The *Norris* decision by the California Supreme Court, coming two years after *Porter,* and interpreting virtually the same clauses and statutes which are involved in this Arizona case, must be regarded as controlling in the instant case.*

C. APPLICATION OF THE FOREGOING PRINCIPLES TO THE FACTS IN THE INSTANT CASE.

1. The parents had given the son permission to use the car for limited purposes only. There were general rules which governed Kenneth's use of the car at any time that he took it. He had to get permission to use the car subject to a requirement to return home at a time agreed upon.

**Porter* has been interpreted in this manner. Thus in *Carlton v. State Farm Ins. Co.,* 309 P.2d 286, 288 (Okla. 1957), the case is interpreted as holding coverage under an omnibus clause only where the insured had not prohibited the permittee from allowing anyone else to use the vehicle. Here there was such a prohibition.

He was to avoid excessive use of the car. He was to obey the laws. He was to avoid taking the car away from the Salt River area (T. 85). On the morning of the accident, Kenneth had specific permission to take the car to go to school and return (T. 45-46).

At a time preceding the accident in question, Mr. Ray A. Judd had taken the keys to the car away from Kenneth, and gave him the use of the car

> "only on times when he couldn't get other transportation or such as going to school. During the week he drove with some of his fellow workers, but they weren't all living in the same neighborhood and couldn't take him to school, so I allowed him to use it Saturday morning." (T. 44).

Thus, at the time in question, Mr. Judd was being "very tight with the use of the car." (Tr. 44-45).

2. The son had been expressly forbidden to permit other persons to use the car.

Quoting from the examination of Mr. Ray A. Judd:

> "Q. Now, Mr. Judd, with respect to the question of allowing third parties to drive your car, did you have any rules or regulations laid down in that regard as far as Kenneth's use of the car was concerned?
>
> "A. I was very emphatic about telling him—about telling him not to let anyone use the car.
>
> "Q. On more than one occasion?
>
> "A. Very frequently I would remind him of that. Not every occasion.
>
> "Q. Specifically, what did you remind him of?
>
> "A. Tell him to be sure and not let anybody use the car." (T. 11)

From the testimony of Mrs. Judd, upon examination by Mr. Grainger:

"Q. Now, Mrs. Judd, you have heard your husband's testimony with respect to Ken's usage of the car. Were you present on any occasion when your husband told Kenneth that he could not loan the car to any other person?

"A. Yes, sir.

"Q. And were you present on more than one occasion?

"A. Yes." (T. 48-49)

From the testimony of Kenneth Judd, on cross-examination by Mr. Grainger:

"Q. It is true, is it not, that he continually told you time and again that no one was to use that family car except you and himself?

"A. Yes.

"Q. It's true, is it not, Ken, that on no occasion prior to this accident had Willene ever used the family car?

"A. Yes, it is true." (T. 116)

3. There was no waiver by acquiescence in disobedience. The Judds were by no means the sort of parents who gave an instruction and then ignored possible violations of it. In previous instances in which the son had failed to stay within the limitations of use prescribed, he had been disciplined for it. Ken was reprimanded on the occasions when he violated his instructions; and the car was taken away from him for periods of time. (T. 23)

Quoting from the testimony of Kenneth Judd upon cross-examination by Mr. Grainger:

"Q. Then you understood, did you not, that anytime you violated these orders and your father caught you you were going to be reprimanded and cautioned?

"A. Yes.

"Q. It happened on several occasions?

"A. Yes.

"Q. Everytime you violated one of your father's rules or regulations you were punished or reprimanded, were you not?

"A. Yes.

"Q. At least insofar as those that he found out about?

"A. Yes." (T. 116-117)

4. The named insureds had no knowledge whatsoever of the use of the car by third persons, much less this one.

From the direct examination of Mr. Judd by Mr. Grainger:

"Q. To your knowledge, up to February 28, 1959, Mr. Judd, had Kenneth ever permitted any other person to drive your automobile?

"A. I didn't know of any time at all, no." (T. 12)

From the direct examination of Mrs. Judd, by Mr. Grainger:

"Q. Mrs. Judd, to your knowledge did Kenneth ever allow any third party to use your car?

"A. Not to my knowledge, no." (T. 49)

From the testimony of Kenneth Judd upon cross-examination by Mr. Grainger:

"Q. And, Ken, insofar as your own knowledge is concerned, it is true, is it not, that your father never knew that on any occasion you had loaned this car to anyone else until this occasion when Willene was involved in this accident?

"A. Yes." (T. 117)

5. The lack of implied permission is confirmed by Willene who knew that her use was improper.

Excerpt of the testimony of Alice Willene Williamson, upon cross-examination by Mr. Grainger:

"Q. Willene, had you ever on any occasion before February 28, 1959, driven Mr. Judd's 1957 Chevrolet?

"A. No.

"Q. Had you on any occasion ever asked him for the use of that car?

"A. No.

"Q. Now, with respect to Ken giving you permission to use the car that day, did you have any understanding with him with respect as to whether or not his parents knew about it?

"A. Yes.

"Q. And isn't it a fact, Willene, that Ken told you that his parents were not to know about it because they did not—would not give permission?"

(Mr. Quisenberry here objected and withdrew his objection.)

"Q. (By Mr. Grainger) Let me rephrase the question. Willene, isn't it true that Ken told you that you were not to tell his parents that you were going to drive the car on that Saturday morning?

"A. Yes.

"Q. And the reason for that was that his parents would not allow anyone else to drive the car?

"A. Yes.

"Q. You understood that at the time you took the car did you not?

"A. Yes.

"Q. You knew you were doing something that the Judds would not approve of?

"A. Yes." (T. 64, 65)

D. CONCLUSION.

We appreciate the burden on anyone who comes to this Court asking it to reverse a decision because there is no evidence to support the result reached. It is a heavy bur-

den, but it is not insuperable. When there is no evidence at all, a Federal Appellate Court will, of course, reverse. *United States v. McAlister,* 88 F.2d 379 (9th Cir. 1937). *New York Life Insurance Company v. Doerksen,* 75 F.2d 96 (10th Cir. 1935).

We put our challenge to the appellee: Where in this transcript is there any evidence at all of implied permission? Is there any evidence at all that use by third persons was not expressly prohibited? Surely, when there is solid testimony, throughly confirmed by conduct, that the use was restricted, there must be something substantial to prove to the contrary.

II. Mere "Lack of Objection" Does Not Create Implied Permission; Knowledge, or Other Circumstances Implying Consent Are Required.

The trial Court should not have given defendant's Requested Instruction No. 4, and should have given plaintiff's Requested Instruction No. 3. As shown in the statement of facts, the sum and substance of the difference in these instructions is that plaintiff defined "implied permission" as one which could "arise from a course of conduct pursued with knowledge of the facts," while the defendant defined "implied permission" as being, among other things, "lack of objection," without any requirement of knowledge.*

---

*It should be noted that there were three sets of requested instructions given to the judge. The instruction that was granted and the instruction requested by the plaintiff have been set forth and discussed. The third requested instruction on the question of implied permission, that of John Brenkman, reads in relevant parts as follows: "It is not necessary that you find the directly granted permission to her, as permission may be *implied* from circumstances, it may be implied from a course of conduct of the parties indicating consent or acquiescence; or permission may be implied from lack of objection under circumstances signifying assent." (R. 36). The importance of this requested instruction is that it, like the plaintiff's requested instruction, makes clear that "circumstances signifying assent" are necessary before lack of objection can amount to implied permission.

There can not be a grant of implied permission without some knowledge or other indication of assent; *Tomasetti v. Maryland Casualty Co., supra; Hamm v. Camerota, supra.* The only substitute for knowledge is some other circumstance which signifies assent. That is to say, we are not contending that knowledge is always an absolute prerequisite. Doubtless, if a father were to give his car to his son, without restriction, and some emergency were to arise whereby the son loaned the car to someone else, the father might well be held to have impliedly permitted the use of the car by the third person.

The point is that absent some special circumstances, there must be either knowledge, or as expressly stated in *Hinton v. Indemnity Insurance Company of N. A.,* 175 Va. 205, 8 S.E. 2d 279, 283 (1940): "lack of objection *under circumstances signifying assent.*" [Emphasis supplied].

What is wrong with the instruction in the instance case is that it put the "lack of objection" element of the *Hinton* case to the jury without carrying with it the requirement of "circumstances signifying assent." This is not a matter of a mere turn of a phrase; it totally changes the nature of the case.

The Supreme Court of Washington reversed a finding of implied permission on very similar facts saying, among other things:

> "There was no finding that the latter [the owner] knew that possession of this car was being given to Sisson [the driver], or that the son had ever loaned it to him or anyone else with the father's knowledge." *Hamm v. Camerota,* 48 Wash. 2d 34, 290 P.2d 713, 717 (1955). See also *Holthe v. Iskowitz,* 31 Wash. 2d, 533, 197 P.2d 999, (1948).

The instruction to the jury on implied permission thus eliminated an essential element in the face of a request by

the plaintiff which included that element, a request by one of the two defendants which included that element, and an objection made by Mr. Grainger which explicitly informed the court that implied permission, to be shown by a course of conduct, "must signify clearly and convincingly an understanding consent." (T. 152).

The jury might have been justified in finding that the Judds had made no special objection to Willene's use of the car.

Quoting from the direct examination of Mr. Ray A. Judd by Mr. Grainger:

> "Q. Had you specifically told Kenneth not to let Willene use the car?
>
> "A. No. I didn't mention her name. I just told him not to let anybody use it." (T. 14)

Following the Court's instruction, this "lack of objection," even though it occurred in ignorance, could constitute implied permission.

As a matter of law, there is no implied permission in this case. But the Court's charge on this question, the only one submitted to the jury upon special verdict, gave the question of implied permission to the jury, and gave them that questoin to be answered in terms of erroneous and highly misleading instruction.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed.

Lewis Roca Scoville Beauchamp & Linton

By John P. Frank
D. W. Grainger
Attorneys for Appellant

August, 1963

I certify, that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John P. Frank